IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-298

PETER JAMES

Petitioner,

v.

WILMINGTON NEWS JOURNAL CO., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order of the United States District Court for the District of Columbia dated February 27, 1976, granting respondents' motions to dismiss, and the judgment of the United States Court of Appeals for the District of Columbia Circuit, delivered June 2, 1977, affirming the judgment of the District Court, are appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming dismissal by the District Court for lack of complete diversity of citizenship, where such diversity was in fact lacking and where petitioner, who was represented by counsel at all relevant times, made no motion to dismiss the non-diverse party respondent?

2. Was the Court of Appeals' affirmance correct in any event because of a demonstrated lack of personal jurisdiction and improper venue?

STATUTE AND RULES INVOLVED

The pertinent portions of Title 28 U.S.C. § 1332 (1970), Rule 21 of the Federal Rules of Civil Procedure, and Rule 19 of the United States Supreme Court Rules are set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

Petitioner commenced this case by filing pro se a complaint in the United States District Court for the District of Columbia on March 7, 1975.[1] Thereafter, on March 12, 1975, Stanley R. Jacobs entered his appearance as attorney for petitioner. (Appendix p. 3A.)[2] The complaint

[1] The Petition for a Writ of Certiorari erroneously recites this date as "March 7, 1965."

[2] This and following references are to the Appendix filed in the United States Court of Appeals for the District of Columbia Circuit pursuant to Rule 30(b) of the Federal Rules of Appellate Procedure.

named as defendants three Delaware corporations, Wilmington News Journal Co. ("News Journal"), E. I. duPont de Nemours and Company ("duPont"), and Christiana Securities Company ("Christiana"), and three individuals, Richard P. Sanger, Norman E. Isaacs, and Ida Kosciesza, all of whom are respondents here. (Appendix p. 8A.) The action was primarily one for newspaper libel and related tortious interference with petitioner by respondents, who, it was asserted, maintained places of business in the District of Columbia. (Appendix p. 134A.) The complaint further alleged that petitioner was a resident of Maryland, and that the court had jurisdiction over the action pursuant to 28 U.S.C. § 1332 based on diversity of citizenship and amount in controversy.

On August 26, 1975, Ira M. Lowe and Martin S. Echter entered their appearances as co-counsel for petitioner. (Appendix p. 35A). Michael P. Goldenberg then entered his appearance as counsel for petitioner, on October 14, 1975, following which Messrs. Jacobs and Echter withdrew their appearances. (Appendix pp. 37A-39A.)

On January 15, 1976, petitioner's counsel Mr. Goldenberg filed a memorandum with the District Court on petitioner's behalf, opposing motions filed by respondents during the preceding month. The memorandum objected to the respondents' motions to dismiss the action for lack of personal and subject matter jurisdiction and for improper venue, as well as to respondent News Journal's alternative motion for a transfer to the District of Delaware, though it did not oppose transfer of the action as to other respondents to the District of Columbia pursuant to motion. (Appendix p. 134A.) In addition, on January 27, 1976, Mr. Goldenberg filed an affidavit of petitioner James in opposition to respondents' motions. (Appendix p. 168A.)

The motions and affidavits in support filed by respondents established, in regard to the District Court's lack of personal jurisdiction, that neither Christiana nor its wholly owned subsidiary News Journal maintained

places of business or otherwise engaged in business transactions in the District of Columbia, except for News Journal's employment of one correspondent there for the sole purpose of gathering and reporting news.[3] (Appendix pp. 60A-62A, 68A-70A.) The remaining corporate respondent, duPont, was apparently joined in this action only because of the stock interest in it held by, and contemplated merger with, Christiana. (Appendix p. 9A). The motions and supporting affidavits further showed that individual respondents Sanger and Isaacs had no contacts with the District of Columbia other than occasional personal visits and Sanger's attendance at one convention, and that they received copies of the summons and complaint by mail at their homes in Delaware, the State of their residence and citizenship. (Appendix pp. 67A-69A, 73A-75A.) Finally, the motions and supporting affidavits disclosed that individual respondent Kosciesza had no business contacts with the District other than two newsgathering assignments in the four years of her employment by News Journal. (Appendix p. 72A.) With regard to the lack of subject matter jurisdiction, the motions and Mrs. Kosciesza's affidavit showed that she had continuously resided in and been a citizen and domiciliary of Maryland for eight years as of December, 1975, and that she received her copy of the summons and complaint in Maryland. The foregoing allegations were not controverted by petitioner. (Appendix p. 71A).

By order filed February 27, 1976, the District Court, Judge Corcoran, dismissed the action for lack of complete

[3] It has long been settled that collection of news in the District of Columbia by a foreign newspaper corporation, with personnel and an office in the District employed only for news-gathering, will not be held to constitute either doing or transacting business such as would subject the newspaper corporation to legal process in the District. *Neeley v. Philadelphia Inquirer Company*, 62 F.2d 873 (D.C. Cir. 1932); *Bilbrey v. Chicago Daily News*, 57 F.Supp. 579 (D.D.C. 1944); *see also Washington v. Hospital Service Plan of New Jersey*, 345 F.2d 105, 108 n. 2 (D.C. Cir. 1965).

diversity of citizenship between all the parties plaintiff and defendant. Petitioner's counsel Mr. Goldenberg filed a notice of appeal on March 26, 1976. (Appendix p. 217A.) In the Court of Appeals for the District of Columbia Circuit, the trustee of petitioner's estate in bankruptcy, Martin S. Protas, was granted leave to proceed in this action *in forma pauperis,* but on January 27, 1977, the court struck the trustee's brief, pursuant to joint motion of respondents, holding that the trustee had no interest in the action. The court then allowed petitioner 30 days to obtain counsel or proceed *pro se* and file a brief on appeal, after which the time for filing was extended to March 31, 1977, on motion of Nicholas Kapnistos, who had entered his appearance on behalf of petitioner.

Mr. Kapnistos, who is presently petitioner's counsel, filed a brief on appeal in petitioner's behalf on March 31, 1977. When counsel for the parties appeared for oral argument before the Court of Appeals, Mr. Kapnistos declined to argue, and with consent of counsel for respondents the case was submitted on briefs. On June 2, 1977, upon consideration of petitioner's brief and respondents' brief in opposition thereto, the Court of Appeals affirmed the District Court's judgment dismissing the action without opinion.

ARGUMENT

Petitioner has failed to demonstrate any reason why this Court should grant a writ of certiorari in the present case. He points to no basis in this Court's rules for granting his petition. His assertions that the courts below "abused their discretion" does not bring his case within this Court's Rule 19(1), which indicates *inter alia* that in determining whether to grant the writ the Court may consider a situation:

> (b) Where a court of appeals...has so far departed from the accepted and usual course of judicial pro-

> ceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the court's power of supervision.

The facts obviously show no such departure or abuse of discretion. Respondent Kosciesza was a resident, citizen, and domiciliary of Maryland, as she had been for nearly eight years, at the time petitioner filed his complaint. This fact was recited in respondents' memorandum to the District Court in support of their motions to dismiss, and is amply established by Mrs. Kosciesza's affidavit, which petitioner did not contest. Petitioner's own complaint established that he too was a resident of Maryland. The law is well settled that an allegation of residence standing alone is tantamount to an allegation of citizenship and domicile. *District of Columbia* v. *Murphy,* 314 U.S. 441, 455 (1941); *Stine* v. *Moore,* 213 F.2d 446 (5th Cir. 1954); *Weitknecht* v. *District of Columbia,* 195 F.2d 570, 571 (D.C. Cir. 1952), *cert. denied,* 344 U.S. 837 (1952). As a result of the allegations of petitioner and respondents, it affirmatively appeared that petitioner and respondent Kosciesza were citizens of the same State, and hence that complete diversity of citizenship was lacking.

Petitioner had the burden of establishing diversity jurisdiction. *Mas* v. *Perry,* 489 F.2d 1396, *reh. denied,* 492 F.2d 1242 (5th Cir. 1974), *cert. denied,* 419 U.S. 842 (1974); *Stine* v. *Moore, supra; Schuckman* v. *Rubenstein,* 164 F.2d 952 (6th Cir. 1947), *cert. denied,* 333 U.S. 875 (1948). After petitioner's allegation of diversity of citizenship was contested by respondents' allegations, petitioner utterly failed to meet his burden of proof of diversity. Petitioner's appellate counsel has not contended that there was complete diversity. Instead, he argues that the District Court should have taken it upon itself to dismiss as to respondent Kosciesza, even though petitioner's trial counsel did not so move.

Petitioner's argument that the trial court abused its discretion by not undertaking, on its own motion, to dismiss as to the non-diverse party respondent is totally devoid of

merit. His argument cites no authority and, in fact, runs directly contrary to authority. It relies heavily on Rule 21 of the Federal Rules of Civil Procedure, but ignores the fact that that Rule vests the trial judge with broad discretionary powers in this regard. *See generally* 3A *Moore's Federal Practice* ¶ 21.05[1], at 21-22 (2d ed. 1974) ("Rule 21 gives the court a broad discretion in the matter of dropping or adding parties"). Though petitioner would rewrite Rule 21 to have it compel, rather than merely permit, the courts to sever non-diverse parties on their own initiative, the simple truth is that the Rule, as it currently exists, embodies no such compulsion.

No case has been cited by petitioner, and none has come to the attention of respondents, where a failure to sever a non-diverse party, on the court's own motion, was held to be an abuse of discretion. Indeed, the authority on point is to the contrary. For example, in *Ray* v. *Bird and Son and Asset Realization Co.,* 519 F.2d 1081, 1083 (5th Cir. 1975), the court held:

> ...no error can be predicated on the failure of the court to drop Bird & Son [a non-diverse party] on its own motion.

In *Rosenthal & Rosenthal, Inc.,* v. *Aetna Cas. and Surety Co.,* 259 F. Supp. 624, 631 (S.D.N.Y. 1966), the court stated:

> The suggestion that diversity jurisdiction can be perfected by the dismissal of the suit against the nondiverse defendant...cannot be entertained since there is no motion by plaintiff before this court seeking such relief.

Accord, Johnston v. *Oregon Elec. Ry. Co.,* 145 F. Supp. 143 (D.Ore. 1956); *McGrier* v. *P. Ballantine & Sons,* 44 F. Supp. 762 (E.D.N.Y. 1942).

Petitioner, who was at all relevant times actively represented by counsel, made no motion to dismiss the non-diverse party. In his memorandum opposing respondents' motions to dismiss petitioner did not request or suggest dismissal of any party, but instead suggested that he would not oppose the transfer of his action as to

respondents other than News Journal to the District of Delaware. It is plain that this was really no suggestion to dismiss Mrs. Kosciesza at all, but rather was only an inconsistent indication of a desire to retain her as a party but split his lawsuit between two district courts.

Petitioner attempts to evoke the sympathy of the Court by alluding to his pro se drafting of the complaint and his encountering the bar of the statute of limitations now that his action stands dismissed. But at all relevant times after the filing of his complaint petitioner was in fact represented by counsel, as is set forth in detail in respondents' Statement of the Case, *supra*.

It is apparent from the foregoing that the District Court and Court of Appeals cannot be said in any way to have "departed from the accepted and usual course of judicial proceedings" within the meaning of this Court's Rule 19, by failing to dismiss a party *sua sponte*. But even if this were not so, it is clear that the writ should not be granted in the present case. The decisions below must stand in any event since the record shows that there was lack of personal jurisdiction as well as improper venue. An appellate court may affirm the decision of a lower court on any ground that is supported by the record, *Jaffke* v. *Dunham*, 352 U.S. 280 (1957), and where the record reveals other grounds for affirmance of the judgment, it is immaterial that the lower court's reasoning in reaching that judgment may have been incorrect, *Laughlin* v. *Eicher*, 145 F.2d 700 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945). As demonstrated in respondent's Statement of the Case, *supra*, the District Court for the District of Columbia lacked personal jurisdiction over the principal newspaper respondent, its employees, and parent corporation, due to their lack of residence in and business contacts (including the alleged libel and defamation) with the District of Columbia. Even if the arguments advanced in the petition had merit, it is nonetheless clear that the disposition by the courts below was correct. Remand of this case would

therefore be a futile act. The granting of the writ in these circumstances would be improvident.

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain his burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. In light of the authorities, and especially in consideration of petitioner's representation by counsel at all relevant times, the courts below did not abuse their discretion in dismissing this action for want of complete diversity. Further, the record shows that there were alternate grounds requiring dismissal and attesting to the correctness of the result below. Accordingly, respondents ask that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

Statute

Title 28 U.S.C. § 1332 (1970)

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between
(1) citizens of different States;"

Federal Rules of Civil Procedure

Rule 21

"Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action on such terms as are just. Any claim against a party may be severed and proceeded with separately."

United States Supreme Court Rules

Rule 19

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
(a) . . .

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."